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Master and Servant--Master's Duty to Furnish the Servant a Safe Place to Work

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ment claimed. Having notice, the court correctly found that the purchaser of the servient tenement had no right to obstruct the easement, which was created by the doctrine of "implied grant" in the case of *Hedges* v. *Stucker*, supra.

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MASTER AND SERVANT—MASTER'S DUTY TO FURNISH THE SERVANT A SAFE PLACE TO WORK.—It is the duty of the master to exercise ordinary care to furnish the servant as reasonably safe a place to work as is compatible with the circumstances.

In the recent case of *O'Brien & Co.* v. *Shelton's Adm'r.*, 246 Ky. 538, 55 S. W. (2d) 352 (1933), the servant was employed to help wreck a warehouse. While he was sitting astride a brace engaged in the work, the brace slipped loose causing him to be thrown to the ground and killed. Witnesses testified that the work was not being carried on in the usual, customary, and safe manner.

The court held that the strict "safe place" doctrine was not applicable in the case of the demolition of a building for the reason that such work is essentially hazardous and the conditions change continually as the work progresses. Under such circumstances the servant necessarily assumes the ordinary and obvious risks incident thereto. But the servant does not assume the risks of an extra-hazardous method adopted by the master as in this case, and the servant may recover for any injuries resulting therefrom.

The above result is sound. It represents the law in Kentucky and is supported by the decided weight of authority in other jurisdictions. Cases involving injuries incurred while engaged in the construction or demolition of buildings constitute a large percentage of the cases in which the safe place doctrine is invoked, and they are consistently held to be an exception or limitation to this rule. Such work is inherently dangerous. The dangers are mostly unforseeable and difficult to guard against. The employee then assumes the ordinary risks incident to such work. If a building is out of repair that is why it is being wrecked. Under such circumstances it would be absurd to say the employer must make the building safe so the servant may tear it down. *Ballard and Ballard Co.* v. *Lee's Adm'r.*, 131 Ky. 412, 115 S. W. 732 (1909); *Dyer* v. *Pauley Jail Bldg. Co.*, 144 Ky. 592, 139 S. W. 789 (1911); *Standard Oil Co. of Ky.* v. *Watson*, 154 Ky. 550, 157 S. W. 929 (1913); *Clark* v. *Johnson County Telephone Co.*, 146 Iowa 428, 123 N. W. 327 (1909).

It should be noted in such cases that (1) the plaintiff himself does not create the danger during the progress of the work, (2) the plaintiff was not engaged in making a dangerous place safe. The significance of these points is obvious for the reason that the employer is not an insurer of the employee's safety. 39 C. J. Sec. 381; *Fuller* v. *Ill. Ry. Co.*, 138 Ky. 42, 127 S. W. 501 (1910). If the type of work is such that the servant creates the dangers in the progress of the work it would be unreasonable to hold the master bound to guard against

them. If the servant is engaged in making a dangerous place safe, the master is certainly not bound to furnish him a safe place to work. *McCarty* v. *L. & N. Ry. Co.*, 202 Ky. 460, 260 S. W. 6 (1924); *Archer* v. *Eldridge*, 204 Mass. 323, 90 N. E. 525 (1910). The safe place rule does not apply when the conditions are constantly changing and the changes create the dangers. *Louisville Fire Brick Works* v. *Tackett*, 203 Ky. 367, 262 S. W. 299 (1924). Where a laborer in a mine was engaged in removing dirt and rock which had fallen on a track, it was held that he was not engaged in making a dangerous place safe. *Hazard Coal Co.* v. *Wallace*, 181 Ky. 636, 205 S. W. 692 (1918).

The master must not put the servant in a position known by him to be dangerous and not so known to the servant, and which the servant could not discover by the exercise of ordinary care. *Thompson on Negligence*, § 3979; *Wilson* v. *Chess and Wymond's Co.*, 117 Ky. 567, 785 S. W. 453 (1901). When the question of knowledge is concerned, the age, experience, and intelligence of the workman are proper subjects of inquiry. *Goss* v. *Kentucky Refining Co.*, 137 Ky. 398, 125 S. W. 1051 (1910).

If the master is present, directs the work, and knows the place is unsafe, then the master is under a duty to impart such knowledge to the servant unless the dangers are open and obvious, the servant having equal opportunity to discover them. This acts as a limitation on the rule that if the master is present and directs the work the servant has a right to assume that the place has been made safe for him. If the dangers are open and obvious to master and servant alike then it seems that the servant assumes those dangers. *Williams* v. *City of Spokane*, 73 Wash. 237, 131 Pac. 833 (1913); *Boisvert* v. *Ward*, 199 Mass. 594, 85 N. E. 849 (1908).

Though the work is essentially dangerous, as in construction jobs, and the dangers are open and obvious, the master is liable for any super-added negligence. In the case of *C. & O. Ry. Co.* v. *Hoffman*, 109 Va. 44, 63 S. E. 432 (1909), certain supports were removed from a dangerous structure without notice to the plaintiff who was working thereon. The employer was held liable for the resulting injuries. Where a common laborer was directed to use dynamite though he protested his ignorance of such work, the master was held guilty of actionable negligence in allowing dynamite, though known to be dangerous, to be used in a way that unnecessarily increased the dangers. *Mahoney* v. *Cayuga Cement Co.*, 208 N. Y. 164, 101 N. E. 802 (1913).

There must be actual negligence in such cases and the mere fact that the work is dangerous is no ground for imputing negligence to the master. *Mineral Fuel Co.* v. *Johnson*, 170 Ky. 78, 185 S. W. 484 (1916). Where the negligence relied on was the failure of the master to furnish a safe place to work and the petition alleged defendant's knowledge of the dangerous conditions but did not allege plaintiff's lack of such knowledge, the defendant's demurrer on this point was sustained. *Louisville Fire Brick Co.* v. *Tackett, supra.*

To determine the basis of the master's liability and the standard of care required in such cases we must resort to the law of negligence. Seldom is a man held liable at his peril. Ordinarily one is only bound to exercise the care of an ordinary prudent man under the same or similar circumstances. The master must have knowledge of particular dangers or the opportunity to have acquired that knowledge by the exercise of reasonable care. The servant is also presumed to have knowledge of the ordinary risks incident to a particular place. *L. & N. Ry. Co.* v. *Brown*, 127 Ky. 732, 106 S. W. 795 (1908); *Brewer* v. *N. Y. Ry. Co.*, 124 N. Y. 59, 26 S. E. 325 (1891).

The obligation of the master to furnish a safe place to work makes it his duty to guard against falling objects. In such cases the doctrine of *res ipsa loquitur* has been applied for it is said that ordinarily such accidents do not happen. *Erickson* v. *Shaw*, 87 Wis. 166, 58 N. W. 241 (1894). It is of course the master's duty to guard against traps, hidden dangers, and pitfalls where the servant is working. *Chicago Ry. Co.* v. *McNamara*, 94 Ill. App. 188 (1900).

To render the master liable the injury must have happened to the servant while within the course of and the scope of the master's business. Where a workman is on the employer's premises, but outside the place he is required by his duties to be and goes about for his own purposes he is at best only a licensee, and the owner is of course not bound to make the place safe for him. *Kennedy* v. *Chase*, 119 Cal. 637, 52 Pac. 33 (1898). In *Faulkner* v. *Gatliff Coal Co.*, 228 Ky. 379, 15 S. W. (2d) 236 (1929), the plaintiff was injured by an unguarded fan at a place where his duties did not require him to be. It was held that as to the plaintiff there was no negligence in leaving the fan unguarded. But where an employee went to a place he was directed to go and was injured by a revolving shaft at that place, it was held that the employee was within the scope of the general employment and recovery was allowed. *Paducah Box Co.* v. *Parker*, 143 Ky. 607, 136 S. W. 1012 (1911).

Added to or incident to the master's duty to furnish a safe place to work is the duty to light that place sufficiently. *National Syrup Co.* v. *Carlson*, 155 Ill. 210, 40 N. E. 492 (1895). Another part of or extension to this doctrine is the master's duty to furnish his servant with reasonably safe tools and appliances. This is not applicable in the case of simple tools where the servant has an opportunity to see and recognize the defects, if any, as well as the master. *Reed* v. *Nelson Creek Coal Co.*, 224 Ky. 322, 6 S. W. (2d) 252 (1928).

By way of summary and conclusion it may be said that the safe place doctrine is not applicable where the servant is engaged in wrecking a structure, in construction work, or in any such case where unforeseen contingencies may arise, and against which an oridnary prudent man could not guard. However the master is not absolved of all duty of care. While a servant assumes the ordinary risks of such work, he does not assume the risks of super-added negligence, that is, extra-hazardous methods adopted by the master, or hidden dangers

known only to the master. The master is bound to carry on the work in the usual manner adopted by ordinary prudent men, and the ordinary risks would seem to be those incident to the natural and ordinary method of carrying on that particular business, though that method might be regarded as extraordinary with regard to a different business. The above modifications appear to be just in that both master and servant are dealt with both adequately and equitably. It would be an unfair rule requiring the master to furnish a safe place to work where the very nature of the work prohibits it, while on the other hand it would be an inhumane doctrine relieving the master of all liability and duty of care simply because the work is dangerous.

In the light of the above conclusions it has been shown that the principal case represents well settled law in that the strict safe place doctrine has no application where the work is essentially dangerous, the master being only bound to keep himself free of any super-added negligence.

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